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IN THE

SUPREME COURT

OF

THE UNITED STATES

OCTOBER TERM, 1902.

CLINTON B. WISER, ET AL.,
Appellants,
vs.
JOHN LAWLER, ET AL.,
Respondents.

No. 174.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

ANSWER TO APPELLANTS' REPLY BRIEF.

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(18,287)

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The fact is not disclosed or established by this record that Law- and Wells received one cent of the money paid by the American subscribers to the stock of the Seven Stars Gold Mining Company. It is found that $131,859.52 of the money of the American subscribers went into the treasury of the Industrial Mining & Guaranty Company (Finding 54). But it is also shown that during the period covered by this transaction the full sum of $842,142.13 was received and disbursed by that company (Finding 49), and that it paid out for

purposes connected with this enterprise and which was doubtless chargeable as a debt against the Seven Stars Company the sum of $380,295.81 (Finding 57).

Now the obligation was upon the Industrial Mining & Guaranty Company to pay the price of this mine (Finding 9, and Exhibit D, Printed Record p. 91), and there was no contractual obligation, so far as the record shows, upon the Seven Stars Company to pay for it.

This being the case and it nowhere appearing from the record that the Gold Mining Company paid a dollar of the money received by Lawler and Wells on account of the price, and no facts being found from which the law would imply that the money paid by the American subscribers for their stock came into the hands of Lawler and Wells, the complainants have failed to establish the first requisite to a cause of action to impress property in the hands of Lawler and Wells with a trust. The contract was, as between the Industrial Mining & Guaranty Company and the Seven Stars Company, that the Industrial Company should pay for the mine and convey it to the Seven Stars Company, and in consideration thereof the Seven Stars Company should show that it had $200,000 in its treasury for a working capital and should turn over to the Industrial Company shares of its capital stock aggregating a par value of $2,800,000.

It does not appear from the record either expressly or inferentially, whether the advancements made by the Industrial Mining & Guaranty Company for the benefit of the Seven Stars Company to pay the expense of operating the mine and to make payments on the purchase price, etc., were to be charged to the account of the Seven Stars Company or not. There being no obligation on the part of the Seven Stars Company to pay for the mine, no presumption will arise that the $131,859.52 realized from the American subscribers was expended for that purpose; no such presumption will arise for the further reason that the Industrial Company expended nearly three times that sum for other l gitimate purposes connected with this enterprise, to-wit, $380,295.81. The appellants may sue the other recipients of that fund and assert with equal reason as they do in the present action that the recipients of the fund hold the amount received impressed with a trust in favor of the complainants. The presumption, if such a one can be invoked in the case at bar, would be just as strong in pursuing each of the other two-thirds of the $380,295.81, that the money so received by

the respective recipients was the property of the American subscribers to the stock.

The obligation of the Industrial Company to pay the price of this mine being upon it, what is to restrain the complainants from pursuing the general assets of the Industrial Company, whether in the treasury or elsewhere, and impressing a lien thereon to the amount of $131,859.52 as a trust in favor of the American subscribers. We will confess that if such a suit were brought, and the complainants should invoke a rule of presumption to the effect that American subscribers having paid their subscriptions to the Industrial Company as the agent of the Seven Stars Company, the Industrial Company being under express contractual obligation to pay for the Hillside group of mines and the Seven Stars Company being under no obligation to do so, the law would infer that the Industrial Company applied its own funds to discharge this sum which it had agreed to pay Lawler and Wells, and that the corporate assets remaining would presumptively be held to be a trust fund paid to the Industrial Company and received by that company with notice of equities.

In Finding 30 it is said, "Remittances to the Bank of Arizona after November 1st, 1892, were placed to the credit of the Seven Stars Gold Mining Company." This doubtless refers to the account of the Seven Stars Company on the books of the Industrial Company and the procedure was doubtless resorted to by the latter Company for the purpose of keeping account of the moneys advanced to the Seven Stars Company on account of the enterprise, for Finding 48 makes it very clear just how the remittances were made by it to the Bank of Arizona and how they were credited on the books of that Bank. After the recitation in Finding 47 of all remittances made for payments under the Cowland contract, Finding 48 uses this language :

"48. That the payments of November 12 and December 9, 1892, and in February 11 and June 5, 1893, were made in the following manner, to-wit: The treasurer of the Industrial and Mining Guaranty Company drew a check for each payment on its common fund in the Continental National Bank of New York, which said checks were payable as follows, to-wit: 'To the order of Charles Cowland or Laidlaw & Company' (or, 'to the order of Charles Cowland or the Park National Bank,' as the case was;) 'for telegraphic transfer, to the Bank of California,' (or 'the Bank of Arizona' as the case was) 'for credit to Lawler and Wells on account

of the Cowland contract,' which said checks were collected by the payee and the moneys received therefrom, transmitted in the usual course of business to the Bank of Arizona and there placed to the credit of Lawler and Wells on account of the purchase price of said property, in accordance with the terms of the original escrow agreement, 'Exhibit A,' and the amendments thereof."

The remittances referred to in Finding 48 cover the entire amount remitted except the sum of $9,000, one-half of which was paid on June 3rd and the other half on August 4th, 1893. Nor will Finding 26 which is in the following language, "On May 20, 1893, Lawler received notice in writing that remittances on account of the Cowland contract were being made from money derived from the sale of the stock of the Seven Stars Gold Mining Company," modify the effect of the direct and specific findings of what the facts were. This cannot be construed to mean any more than the plain language conveys. It does not find as a fact that remittances on account of the Cowland contract *were* made from money derived from the sale of the stock of the Seven Stars Gold Mining Company at any time during the past, nor that they were then, namely, May 20th, in process of transmission, nor that they were to be made from that fund in the future. No remittances of any kind had been made for one hundred days prior to May 20th, 1893. None at that time were being transmitted. None were made after May 20th except the three payments of June 3rd, June 5th and August 4th, 1893, aggregating $11,200. There is not a syllable in the entire record to indicate that a dollar was received from these American stock subscriptions after May 15th, 1893, and the only finding of fact in respect to that matter is, "That after the 11th day of May, 1893, the Industrial and Mining Guaranty Company received the sum of $500 and no more, on account of the sale of Seven Stars stock." (Finding 53).

If a person should hear that his intimate friend had fallen dead at a certain time and place he might make the statement of what he had heard with absolute verity. Indeed, to come a little closer to the record before us, he might receive notice in writing that his friend fell dead at a certain time and place, and a court might find as a fact that on a certain day he did receive notice in writing that such was the fact; and it might be true also that subsequent to that date while walking along the street he met his friend face to

face and with surprise congratulated him that the notice received was unfounded in fact. All doubt as to the meaning of the court's finding taken as a whole with respect to the matter under consideration will be dissolved by a reference to finding number 50, which is as follows:

"That the defendants, John Lawler and Ed. W. Wells, did not at any time, prior to the time of the commencement of this action, have any knowledge or notice that any moneys received by them on account of the purchase price of the Hillside group of mines, as provided for in the original escrow agreement of May 12, 1892, came from or was the moneys or any part of the moneys which any one or more of the purchasers of the stock of the Seven Stars Gold Mining Company had paid in to the Industrial and Mining Guaranty Company on account of the purchase price of such stock."

Upon this record we submit that the argument submitted by appellants in their reply brief is founded upon a false premise when it asserts:

"The basic proposition upon which counsel rest the defense of Lawler and Wells is that the findings do not affirmatively show they knew the moneys of appellants received by them had been obtained by false representations."

If our position has not been made clear by the printed brief and argument submitted to this court, we will still be contented with the thought that the court will take the record and the findings of fact as they are written and decide the case according to the rights of the parties as determined by those facts, uninfluenced by the subtly pregnant and erroneous statement of our position by our opponents.

The contention of counsel for appellants upon this proposition is not sustained by the authorities. The case of Holly vs. Domestic and F. M. S., 180 U. S., 284, is somewhat similar, at least, as to the principles involved, to the case at bar. The attitude of the petitioner therein corresponded in a measure to that of the appellants here. His rights are disposed of in the opinion of the court by Mr. Justice Shiras in this language:

"Let it be conceded that he was not, in the circumstances, estopped from following his money into the hands of the missionary

society, by having entered an attachment against Thompson for a frauduient conversion of his money; let it also be conceded that, by trusting his money with Thompson, who had theretofore been his attorney, and whose standing in the community was good, he was not guilty of conduct so reckless and negligent as to, of itself, deprive him of a remedy; yet his case fails in the essential particular that he has not shown that the missionary society, in receiving from Thompson, executor, the money due from the estate of Rev. Dr. Saul, and in applying it in accordance with the appointments in the will, acted with any notice or knowledge, actual or imputable, that Thompson was misapplying funds intrusted to him by a third person with whom the society had no relations whatever. As against the missionary society, Holly, in the circumstances disclosed, has no equities; and even if it could be said that the equities were equal, a court of equity will not transfer a loss that has already fallen upon one innocent party to another party equally innocent."

A mine in litigation, impressed with an alleged lien, clouded by a *lis pendens*, is avoided alike by the operator and the buyer as a leper is avoided by his unafflicted brethren. As merchantable property it is as ineffectual and unattractive as though from its cavernous mouth there continuously issued the monotonous sound, "Unclean, unclean."

We submit that under the principles of good conscience and established equitable jurisprudence, the defendants, Lawler and Wells, are innocent of any wrong; that their loss by reason of this entire transaction—the surrender of the occupation and control of the mines, their use or abuse by others, the clouded title—is irreparable; and this attack upon this property made and persisted in through more than a decade in the behalf and in the manner disclosed by this record betrays on the part of the complainants an atrophy of the sense of property rights.

Respectfully submitted,

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